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No. 88-1019

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1988

HERBERT D. BERKSON,
PETITIONER,

v.

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief and Appendix In Opposition of the Respondent, United Brands Company

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35 pp

Question Presented for Review.

Whether the courts below were correct in unanimously deciding that *res judicata* barred petitioner's suit against United Brands based on the final judgment in petitioner's prior federal action, *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

Parties.

The parties to this action are: (1) Herbert D. Berkson ("Berkson" or "petitioner"), the petitioner in this Court, the plaintiff in the District Court, and the appellant in the United States Court of Appeals for the First Circuit; and (2) United Brands Company ("United Brands"), a respondent in this Court, a defendant in the District Court, and an appellee in the First Circuit.[1]

There are nine additional respondents in this action, all of whom were also defendants in the District Court and appellees in the First Circuit: (1) Covington & Burling; (2) Nathaniel Davis; (3) Del Monte Corporation ("Del Monte"); (4) Goodwin, Procter & Hoar; (5) Henry A. Kissinger; (6) Palmer & Dodge; (7) Pillsbury, Madison & Sutro; (8) Price Waterhouse; and (9) William A. Rogers.

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[1] Pursuant to Rule 28.1, the parent companies, subsidiaries (except wholly-onwed subsidiaries) and affiliates of United Brands are GACC Holding Company, American Financial Corporation, Great American Communications Company, Great American Holding Corporation, F.I.I. — Fyffes PLC. and Pascual Hermanos, S.A.

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Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit, *Herbert D. Berkson* v. *Del Monte Corporation,*

et al., No. 87-1539, dated June 29, 1988, is not published. It is reprinted in Petitioner's Appendix (Pet. App. at 1a).[2]

The Order of the United States District Court for the District of Massachusetts accepting and adopting the Magistrate's Report and Recommendation on Defendants' Motions to Dismiss or, In the Alternative, Motions For Summary Judgment, and thereby entering judgment for United Brands, was dated May 29, 1987 (Pet. App. at 1k).

The Magistrate's Report which was accepted and adopted by the District Court was dated April 23, 1987 (Resp. App. at 1a).

Statement of the Case.

This is the third lawsuit which petitioner has brought against United Brands arising out of the 1972 sale of United Brands' Guatemala banana properties to respondent Del Monte. Since November 3, 1974, when petitioner first filed an action in Massachusetts State Court against United Fruit, now known as United Brands, a Massachusetts Trial Court, a Massachusetts Appeals Court, two Federal magistrates, two Federal District Court judges, two separate panels of the Court of Appeals for the First Circuit, and this Court, have all considered and rejected petitioner's claims against United Brands.

Petitioner commenced the current action on September 25, 1986, seeking injunctive relief and $1 billion in damages. Petitioner's Complaint is primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* but also contains passing references

[2] Citations to Petitioner's Appendix are in the form "(Pet. App. at). " Citations to Respondent United Brands' Appendix printed and bound with this brief are in the form "(Resp. App. at)."

to other statutes and legal theories. The RICO label petitioner now attaches to his claims is new; however, petitioner's factual allegations against United Brands are precisely the same as those he made in his two previous lawsuits.

A. United Brands' Motion to Dismiss or for Summary Judgment.

On November 3, 1986, United Brands moved to dismiss the current action or for summary judgment. United Brands maintained that petitioner's claims were barred by the final judgment in United Brands' favor in *Berkson* v. *Del Monte Corporation and United Brands Company*, No. 79-1180-T (D. Mass., August 5, 1983), *aff'd*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985). The other defendants, likewise, all moved to dismiss or for summary judgment. In support of these motions, defendants advanced grounds including *res judicata*, collateral estoppel, the statute of limitations, and failure to state a claim upon which relief can be granted.

On April 23, 1987, the Magistrate issued his Memorandum and Recommendation on Defendants Motions to Dismiss or, In the Alternative, Motions for Summary Judgment (the "Magistrate's Report") (Resp. App. at 1a). The Magistrate recommended that summary judgment be granted: (1) to defendants United Brands and Del Monte on grounds of *res judicata*; (2) to defendants William Rogers, Henry Kissinger, Price Waterhouse, Pillsbury, Madison & Sutro, Covington & Burling, and Nathaniel Davis, on grounds of collateral estoppel and the statute of limitations; and (3) to defendants Goodwin, Procter & Hoar and Palmer & Dodge, on the basis of the statute of limitations.

On May 29, 1987, the District Court, having accepted and adopted the Magistrate's recommendations, entered judgment

for all defendants (Pet. App. at 1k). On June 29, 1988, the Court of Appeals for the First Circuit affirmed the judgment of the District Court, "substantially for the reasons stated in the Magistrate's Report and Recommendation adopted by the District Court." *Berkson* v. *Del Monte Corporation, et al.*, No. 87-1539, slip op. at 3 (Pet. App. at 1c). On September 15, 1988, the Court of Appeals denied Berkson's petition for rehearing *en banc* (Pet. App. at 1j).

B. Events Leading to the 1972 United Brands Sale of the Guatemala Property to Del Monte.

The events which produced the last 15 years of litigation between Berkson and United Brands may be traced back to 1954. The history is set out in the Magistrate's Report (Resp. App. at 2a-4a) and in the reported decision of the First Circuit Court of Appeals dismissing Berkson's prior federal action. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

On July 2, 1954, the United States commenced an action in the United States District Court for the Eastern District of Louisiana against United Fruit, for alleged violations of the Sherman Act. In 1958, a Consent Decree was entered into by the parties. Article VIII of the Consent Decree required United Fruit to divest itself of a part of its banana producing properties in Latin America.

In 1970, certain United Fruit properties in Guatemala were approved for sale by the Louisiana Federal District Court as a means of fulfilling Article VIII of the Consent Decree. Bids were solicited. Del Monte bid for the properties, and United Fruit accepted Del Monte's bid.

In 1972, the Government of Guatemala approved the purchase. The United States Department of Justice also approved

the sale. After a hearing before the federal district court in Lousiana, the sale gained final court approval. Title to the Guatemalan properties passed from United Fruit to Del Monte on December 14, 1972. With the passage of title, United Fruit fulfilled its divestiture obligations under the 1958 Decree.

Petitioner appeared at the 1972 Federal District Court hearing and registered his opposition to the United Brands - Del Monte transaction. Petitioner addressed the court in oral argument and filed a brief and 159 pages of supporting materials.

C. Petitioner's Previous Law Suits Against United Brands.

On November 11, 1974, Berkson filed an action (hereinafter "*Berkson I*") in Massachusetts State Court alleging that United Fruit and its then Chairman, Eli M. Black, breached an oral agreement to sell him the Guatemala land which had been sold to Del Monte. The Massachusetts Superior Court dismissed Berkson's action and awarded costs to United Fruit. Berkson's appeal of the dismissal was itself dismissed by the Massachusetts Appeals Court on June 14, 1979.

On June 22, 1979, just eight days after dismissal of his appeal in *Berkson I*, petitioner commenced an action (hereinafter "*Berkson II*") in the United States District Court for the District of Massachusetts against United Brands and Del Monte, alleging an unlawful antitrust conspiracy. In this action, as in the state court action which preceded it, the principal wrong complained of by Berkson was United Brands' sale of the Guatemalan divestiture properties to Del Monte.

On March 21, 1983, following three and one-half years of extensive discovery, United Brands and Del Monte moved for summary judgment in *Berkson II*. On July 16, 1983, with the benefit of several hours of argument, and following review of

extensive appendices submitted by all parties, a Federal Magistrate recommended that defendants' motions "be granted on each and every ground" defendants had advanced. The Magistrate specifically found that Berkson's claims accrued at the time of the 1972 divestiture, and that there had been no fraudulent concealment of those claims by United Brands or Del Monte. These findings were adopted by the Federal District Court and affirmed by the First Circuit. The First Circuit later denied Berkson's request for rehearing *en banc* and this Court denied Berkson's petition for *certiorari*. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

D. The Current Action.

On September 25, 1986, Berkson commenced the current action in federal district court in Massachusetts. This action (hereinafter "*Berkson III*") differs from petitioner's prior suits in only two respects: (1) several new defendants have been added; and (2) the same factual allegations made in Berkson's previous suits have been recast as RICO violations.

The Federal Magistrate, Federal District Court judge, and judges of the First Circuit who have considered Berkson's current claims against United Brands have unanimously held that they are barred by settled principles of *res judicata* (Resp. App. at 1a; Pet. App. at 1a, 1k).

Reasons for Denying the Writ.

This is not an appropriate case for exercise of this Court's discretion to grant *certiorari*. The courts below correctly dis-

missed Berkson's claims against United Brands on grounds of *res judicata*. The decision of the Court of Appeals for the First Circuit affirming the District Court's dismissal is not in conflict with the decision of any other Federal Court of Appeals on the same matter and presents no important question of federal law.

I. The Courts Below Correctly Held that Berkson's Claims Against United Brands Are Barred by Res Judicata.

The injury alleged by Berkson as well as every factual allegation underlying his legal claims against United Brands are precisely the same as those alleged in his previous federal suit (*Berkson II*). The current case arises from the same nucleus of operative facts as the previous case. Now as before, the only injury Berkson alleges is his failure to obtain United Fruit's divestiture properties in Guatemala; and now as before the only allegations of misconduct by United Brands concern transactions and occurrences connected in time and place with the 1972 divestiture. The only difference between Berkson's two federal court actions against United Brands is that what were antitrust claims have been relabelled RICO claims. This shift in nomenclature is not enough to overcome the preclusive effects of the final judgment entered against petitioner in *Berkson II*.

It is well established that "a plaintiff may not relitigate a claim for relief by switching legal theories." 1B Moore's Federal Practice ¶0.410[1] at 361 (2d ed. 1988); Restatement (Second) of Judgments § 24, comment c (1982). The principle of *res judicata* exists to end litigation and prevent courts from rehashing cases where:

> the acts complained of and the demand for recovery are the same [and] [t]he only thing that is different is the theory of recovery.
>
> The plaintiff having alleged operative facts which state a cause of action because he tells of defendant's misconduct and his own harm has had his day in court. He does not get another day after the first lawsuit is concluded by giving a different reason than he had in the first for recovery of damages for the same invasion of his rights.

Williamson v. *Columbia Gas & Electric Corp.*, 186 F.2d 464, 469-470 (3d Cir. 1950), *cert. denied*, 341 U.S. 921 (1951). *See generally Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Pasterczyk* v. *Fair*, 819 F.2d 12, 14 (1st Cir. 1987); *Page* v. *United States*, 729 F.2d 818, 820 (D.C. Cir. 1984); Restatement (Second) of Judgments § 24.

The courts below correctly concluded that the doctrine of *res judicata* precludes Berkson from relitigating, under the banner of RICO, his claims against United Brands, all of which are based on the 1972 divestiture sale and upon which a final judgment was entered against him in *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

Berkson raises for the first time in his Petition for Certiorari alleged violations of the Anti-Deficiency Act (the "Act"), 31 U.S.C. §§ 1341 *et seq*. This argument is completely irrelevant. There is no private right of action under the Act. Even if there were a private right of action, it would not overcome the *res judicata* effect of the final judgment against petitioner in *Berkson II*. *See, e.g.*, 1B Moore's Federal Practice ¶0.405[4.- 1] (1988) (Even if a final valid judgment is erroneous, it is not subject to collateral attack); *Federated Dept. Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *United States* v. *Throck-*

morton, 98 U.S. 61 (1878). Moreover, the fact that petitioner now makes arguments under the Act for the first time should preclude this Court from considering them. *See*, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984) ("petitioner did not present this argument to the Court of Appeals, we decline to consider it"); *Miree* v. *De Kalb County*, 433 U.S. 25, 33-34 (1977); *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U.S. 458, 465 (1925).[3]

In his current petition, Berkson raises as an issue the lower courts' dismissal of his RICO claims under the statute of limitations. However, the Magistrate, in a finding adopted by the District Court and affirmed by the First Circuit, dismissed Berkson's RICO claims against United Brands because of *res judicata*, not the RICO statute of limitations (Resp. App. at 6a-8a; Pet. App. at 1c). Nevertheless, the four year statute of limitations governing RICO claims is an additional dispositive bar to petitioner's claims against United Brands. *See* argument, Section III, *infra*.

II. The Decision of the First Circuit Below Is Not in Conflict with Any Decision of Another Federal Court of Appeals and Presents No Important Question of Federal Law.

As early as 1897, the first Justice Harlan explained the settled principle of *res judicata* as one already "announced in

[3] In further response to petitioner's Anti-Deficiency Act arguments, United Brands incorporates herein by reference the arguments contained in the brief of Respondent Covington & Burling in Opposition to Petition for Writ of Certiorari.

numerous cases." *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48 (1897). In the over ninety years which have passed since Justice Harlan's observation, the principle of *res judicata* has remained firmly established in American jurisprudence. *See, e.g., Chick Kam Choo* v. *Exxon Corp.*, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127, 136 (1988) (refers to "the well-recognized concept[ ] of res judicata"); *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980) (observes that "[t]he federal courts have traditionally adhered to the . . . doctrine[ ] of res judicata").

The decision of the First Circuit below affirming dismissal of Berkson's claims against United Brands on *res judicata* grounds is plainly not in conflict with any decision of another federal court of appeals. Moreover, the lower courts' straightforward application of the settled doctrine of *res judicata* presents no important question of federal law.

III. The District Court's Grant of Summary Judgment to United Brands Is Also Supported by the Statute Of Limitations.

The courts below granted judgment to respondents not entitled to assert the bar of *res judicata* on grounds — collateral estoppel and the statute of limitations — that apply with equal force to United Brands and compel judgment in its favor. This is one more reason why *certiorari* would be inappropriate. *See, e.g., Belcher* v. *Stengel*, 429 U.S. 118 (1976); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

As the courts below correctly held, all of petitioner's claims based on the divestiture were time-barred because they arose no later than 1972. Moreover, the Court of Appeals specifically found that petitioner's RICO claims accrued well before Sep-

tember 25, 1982 and were, thus, untimely. Petitioner has wholly failed to identify any act occurring after September 25, 1982 that could conceivably give rise to an actionable RICO claim. The lower courts were thus correct in concluding that all of petitioner's claims are time-barred.[4]

Conclusion.

The dismissal of Berkson's claims against United Brands was based on straightforward application of settled principles of *res judicata*. For the reasons stated, this is not an appropriate case for the exercise of *certiorari*. The petition should be denied.

Respectfully submitted,

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[4] In further support of its arguments concerning applicability of the statute of limitations, respondent United Brands adopts by reference the arguments contained in the Brief In Opposition of Respondent Goodwin, Procter & Hoar.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
86-2775-N

HERBERT D. BERKSON,
Plaintiff

v.

DEL MONTE CORPORATION, ET AL.,
Defendants

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS OR, IN THE ALTERNATIVE, MOTIONS FOR SUMMARY JUDGMENT

April 23, 1987

COHEN, M.

Plaintiff, Herbert D. Berkson, commenced this action on September 25, 1986. This represents his second trip to this court, and third trip to federal courts, complaining about matters attendant to the divestiture of the United Fruit Company. Although primarily based on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, plaintiff's complaint includes claims for common law fraud, intentional interference with contractual and business relations, breach of fiduciary duty, and disclosure of "confidential business and proprietary information belonging to plaintiff

in connection with the purchase of the divestiture properties of the United Fruit Company, now United Brands . . . in Guatemala, Central America." Plaintiff's Complaint § 1. Also mentioned in the body of the complaint are claims for violations of the Sherman and Clayton Acts, the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e), and various criminal statutes not part of RICO.[1]

Plaintiff has named as defendants Del Monte Corp., United Brands Co., Price Waterhouse, Palmer & Dodge, Goodwin, Procter & Hoar, Pillsbury, Madison & Sutro, Covington & Burling, William P. Rogers, Henry A. Kissinger and Nathaniel Davis.

All defendants have moved to dismiss plaintiff's complaint, or in the alternative for summary judgment, based on res judicata, collateral estoppel, statute of limitations, failure to state a claim upon which relief can be granted and immunity.

I. BACKGROUND

In 1954, the United States commenced an action in Louisiana federal court against United Fruits (the predecessor of United Brands) for violations of the Sherman Act. In 1958, a consent decree was entered into by the parties. Article VIII of the decree required United Brands to divest itself of part of its banana producing properties.

In 1970, properties in Guatemala were approved for sale by the Louisiana court and United Brands entered into negotiations

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[1] These criminal statutes — 18 U.S.C. §§ 371, 1621, 1622, 1623, 1005, 1546 and 2071 — are not predicate offenses within the meaning of RICO's definitions of "racketeering activity." *See* 18 U.S.C. § 1961(1). As a result, they cannot form the bases of a RICO claim. *See United States* v. *Pepe*, 747 F.2d 632, 645 (11th Cir. 1984). Nor do purely criminal statutes provide private right of action to a civil litigant such as plaintiff. *See, e.g., Dugar* v. *Coughlin*, 613 F. Supp. 849, 852 n.1 (S.D.N.Y. 1985) (no private right of action under 18 U.S.C. § 371); *Fiorino* v. *Turner*, 476 F. Supp. 962, 963 (D. Mass. 1979) (same); *Weiland* v. *Byrne*, 392 F. Supp. 21, 22 (N. D. Ill. 1975) (private litigant does not have standing under 18 U.S.C. § 1621).

with Del Monte for the purchase of the properties. However, in 1971, the Guatemalan government disapproved Del Monte as a buyer and indicated that it would prefer to deal with Guatemalan nationals. In 1972, Del Monte successfully resumed its efforts to purchase the properties; Guatemala approved Del Monte as a purchaser and the sale was confirmed by the Louisiana court. The divestiture occurred on December 14, 1972.

According to plaintiff, he and a Guatemalan, Julian Presa, had formed an enterprise, the Pan Tropic Fruit Company, to purchase the divestiture properties. Plaintiff appeared as *amicus curiae* at the hearing before the Louisiana court to oppose the sale of the properties to Del Monte. He has been challenging the results of the divestiture ever since.

In November 1974, plaintiff filed an action in Massachusetts state court against United Fruit and Eli M. Black, United's then chairman. Plaintiff alleged that United Fruit and Black had breached an oral contract to sell to him the divestiture properties. This suit was dismissed by the state court, as was plaintiff's appeal to the Massachusetts Appeals Court.

Shortly after the dismissal of his appeal in June, 1979, plaintiff commenced an action in this Court, Civil Action No. 79-1180-T. Plaintiff named as defendants Del Monte and United Brands; he alleged that they violated the federal antitrust laws by excluding companies other than Del Monte from purchasing United Brands' Guatemala properties, by undermining plaintiff's efforts to purchase the properties, by refusing to divulge information and divulging false information concerning the properties, by using bribery and political pressure to obtain Guatemalan approval of Del Monte as the purchaser, and by withholding information from the Louisiana federal court in 1972.

In March, 1983, United Brands and Del Monte moved for summary judgment. In July, 1983, after submission of briefs

and oral argument, Magistrate DeGiacomo recommended that defendants' motions be granted. He found that plaintiff's action was time-barred, that plaintiff lacked standing under the Clayton Act, that the Act of State Doctrine barred plaintiff's action and that plaintiff's suit was an impermissible collateral attack on the consent decree and judgment of the Louisiana federal court. The District Court approved the Magistrate's recommendation and granted defendants' motions for summary judgment in August, 1983.

Plaintiff appealed to the United States Court of Appeals for the First Circuit. On September 17, 1984, the First Circuit affirmed the District Court's grant of summary judgment on the ground that the action was time-barred. *Berkson* v. *Del Monte Corp.*, 743 F.2d 53 (1st Cir. 1984). Plaintiff petitioned the United States Supreme Court for *certiorari*. The petition was denied in March, 1985. 105 S.Ct. 1765 (1985). Plaintiff thereafter filed the instant action.

II. DISCUSSION

A. *Summary Judgment Standard*[2]

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2555 (1986) (quoting Fed. R. Civ. P. 1). To survive defendants' motions for summary judgment, plaintiff must demonstrate that there is a genuine issue of material fact requiring a trial. Fed. R. Civ. P. 56(e); *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 106 S. Ct. 1348, 1355-56 (1986). As the Supreme Court recently has made clear, the standard for granting sum-

[2] Because papers outside the pleadings have been considered, this court will treat the instant motions as motions for summary judgment. Fed. R. Civ. P. 12(b).

mary judgment "mirrors" the standard for a directed verdict under Fed. R. Civ. P. 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). That is, the inquiry focuses on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 2512. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita,* 106 S.Ct. at 1356 (citing *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968)).

In determining defendants' motion for summary judgment, this court must view the evidence and all inferences in the light most favorable to the party opposing the motion. *Hahn* v. *Sargent,* 523 F.2d 461, 464 (1st Cir. 1975) (citations omitted), *cert. denied,* 425 U.S. 904 (1976). However, plaintiff may not obtain a trial merely on the allegations in his complaint, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968), or by showing that there is "some metaphysical doubt as to the material facts," *Matsushita, supra,* 106 S. Ct. at 1356 (citations omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson,* 106 S. Ct. at 2510.

Plaintiff's complaint can be read to concern two distinct sets of events. First are his allegations that the 1972 method of divestiture and the incidents surrounding it violated RICO, other laws, and common law rights belonging to plaintiff. Second, plaintiff complains about the defendants' actions during the prior federal suit in this court. Because different legal standards apply to each of these claims, this court will address each separately.

B. *Claims Based on the 1972 Divestiture*

1. United Brands and Del Monte

United Brands and Del Monte, the two defendants in the prior federal action, claim that plaintiff's RICO claims against them are barred by the doctrine of *res judicata,* or claim preclusion. That conclusion is inescapable in the circumstances.

Under this doctrine, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980). A grant of summary judgment is a judgment on the merits. *See Rose* v. *Town of Harwich,* 778 F.2d 77 (1st Cir. 1985), *cert. denied,* 106 S.Ct. 2278 (1986); *Isaac* v. *Schwartz,* 706 F.2d 15, 17 (1st Cir. 1983) (dismissal for failure to state a claim under Rule 12(b)(6) is a judgment on the merits); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶0.409 [1.-2] (1984) (judgment on motion for summary judgment is on the merits).

The bar of res judicata, however, is limited to cases arising out of the same claim or cause of action. *Manego* v. *Orleans Board of Trade,* 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied,* 106 S.Ct. 1466 (1986). This Circuit has adopted the approach of § 24 of the *Restatement (Second) of Judgments* in determining when two cases concern the same claim. *Id.*

> § 24. Dimensions of "Claim" for Purposes of Merger or Bar — General Rule Concerning "Splitting"
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar. . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) Judgments § 24 (1982).

Plaintiff cannot avoid res judicata by pleading different legal theories or by adding new defendants. *Manego*, 773 F.2d at 6; *Restatement*, § 24, comm. c., § 25, comm. d. As the comments to § 24 point out:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.

§ 24, comm. c. Similarly, when a judgment is on statute of limitations grounds, as in plaintiff's prior suit, the bar is not avoided by shifting the legal theory on which the claim is pitched. *Moore's Federal Practice*, ¶0.409[6]. If the transaction underlying the two suits is the same, res judicata is a bar to the second suit.

There is no doubt that the underlying facts of the RICO claim are precisely the same as the facts underlying the antitrust claim. Plaintiff's first complaint concerned alleged violations of the antitrust laws based on the 1958 consent decree and 1972

divestiture of the Guatemalan banana properties. His second complaint involves the same occurrences, but alleges that the divestiture and those who took part in it violated RICO. This court has carefully reviewed plaintiff's pleadings in this case and is unable to find any factual allegations indicating that plaintiff's current action grows out of a different transaction than that alleged in his first suit.

Widening the alleged conspiracy to include government officials and law firms does not change this result; the fact is that the actions of the new defendants which are alleged to violate RICO are the same actions about which plaintiff has complained in the prior suit. Plaintiff adds little that is different in this action and any minor differences that he does allege do not transform his second suit into a new cause of action. *See Manego,* 773 F.2d at 6. Res judicata, then, bars all of plaintiff's claims which concern the 1972 divestiture.[3]

2. The Remaining Defendants

The remaining defendants, not parties to the prior suit, also argue that *res judicata* bars this present RICO action against them. Although there is some support for the position that strangers to the first action may claim the effects of *res*

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[3] Plaintiff argues that, because none of the defendants had been convicted under RICO, he could not have brought his RICO suit until 1985 when the United States Supreme Court resolved a conflict among the Circuit and district courts. *See Sedima, S.P.R.L.* v. *Imrex Co.,* 105 S.Ct. 3275 (1985) (holding that a RICO private treble damages action may be brought even though defendants have not been criminally convicted of a predicate act under RICO). Plaintiff seeks far too much from far too little. The mere fact that a conflict existed does not excuse a litigant from asserting all claims. The very existence of a conflict indicates that the claim was not frivolous, and plaintiff's choice not to pursue a RICO claim at that time is not a valid defense to the doctrine of *res judicata.*

judicata,[4] that is not the law, except in limited circumstances, in this circuit.[5]

In *Manego* v. *Orleans Board of Trade*, the First Circuit Court of Appeals affirmed the trial court's decision that *res judicata* did not apply to a defendant which was not a party to the prior suit. 773 F.2d at 7, *affirming* 598 F. Supp. 231, 235 (D. Mass. 1984); *see also Valentin* v. *United States Postal Service*, 787 F.2d 748, 750 and n.1 (1st Cir. 1986) (res judicata available only to "parties or their privies"); *Sierra Club* v. *Secretary of Transportation*, 779 F.2d 776, 779 (1st Cir. 1985) (basic prerequisites of res judicata are finality of judgment, *identity of parties* and identity of claim).

The First Circuit cases on which defendants rely exemplify the limited exceptions to the mutuality requirement and are not applicable in this case. For example, in *Capraro* v. *Tilcon Gammino, Inc.*, 751 F.2d 56 (1st Cir. 1985), the court held that the parent of a wholly-owned subsidiary could take advantage of *res judicata*, even though only its subsidiary was a defendant in the first suit. *Id.* at 59 (citing § 59(3) of the *Restatement (Second) of Judgments*, which specifically concerns holders of ownership in corporations). The court held

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[4] Permitting "nonmutual claim preclusion" would be attractive in this case which reflects "no more than a last desperate effort by a plaintiff who is pursuing a thin claim against defendants who were omitted from the first action because they were less directly involved than the original defendants." 18 C. Wright, W. Miller & E. Cooper, *Federal Practice and Procedure*, § 4464, at 588-89 (1981). Professors Wright, Miller and Cooper suggest a limited rule that would permit nonmutual claim preclusion only when the new defendant can show why he should have been joined in the first suit and plaintiff cannot show any good reasons justifying a second chance. *Id.* at 589. This, however, is not the law of this Circuit.

[5] Defendants seemingly argue that the fact that a claim may be the same for *res judicata* purposes even if new defendants are present in the second suit means that those new defendants may also claim the bar of *res judicata*. Section 24's test, however, is only aimed at determining when the same transactions underly two claims once the prerequisites to res judicata already apply, namely, identity of parties.

that under the requirements of § 59(3), the subsidiary had acted at the direction of its parent. *Id.*

Another exception to the rule that there must be identity of parties appears in *Mashpee Tribe* v. *Watt*, 707 F.2d 23 (1st Cir.), *cert. denied*, 464 U.S. 1020 (1983). The claims in *Mashpee Tribe* concerned title to land. When property rights are at stake, new defendants may claim the bar of res judicata. *Id.* at 24-25 (citing *Restatement (Second) of Judgments* §§ 25, 43 comm. c.).

Notwithstanding these limitations, however, defendants may assert the benefits of collateral estoppel, or issue preclusion, on at least those claims of plaintiff involving the 1972 divestiture. *See Manego*, 598 F. Supp. at 236 (stranger to first action may defensively assert principles of issue preclusion) (citing *Parklane Hosiery* v. *Shore*, 439 U.S. 322 (1979)). Collateral estoppel applies when an issue of fact or law is actually litigated and determined by a final judgment and the determination is essential to the judgment. *Restatement (Second) Judgments* § 27; *Manego*, 598 F. Supp. at 236.

The Court of Appeals in *Berkson* v. *Del Monte Corp.* concluded that plaintiff's antitrust claim based on the 1972 divestiture arose no later than December, 1972, and that there was no fraudulent concealment of this claim. 743 F.2d at 55-57. Despite plaintiff's arguments to the contrary, there is no doubt that he had a full and fair opportunity to litigate these issues; when issues are submitted and determined on motions for summary judgment such issues have been "actually litigated." *Restatement*, § 27, comm. d. Also, the factual determinations regarding the bar of the statute of limitations were necessary to the judgment of the Court of Appeals in the prior suit as they were the bases for the affirmance of the district court's grant of summary judgment. *See Berkson* v. *Del Monte Corp.*, 743 F.2d at 57.

Plaintiff's prior suit was based on antitrust law. The instant suit is premised on alleged RICO violations. However, the change in legal theory cannot disguise the fact that plaintiff's two causes of action are grounded on the same transaction — the 1972 divestiture. Plaintiff alleges no new facts regarding the events surrounding the sale of United Brands' Guatemalan banana properties. Thus, the issue of when the antitrust claim arose is identical to the issue of when the RICO claim arose. Both arose by December, 1972. *Cf. Wilson* v. *Retail Credit Co.*, 474 F.2d 1260, 1261 & n.2 (5th Cir. 1973) (finding that statute of limitations barred plaintiff's libel claim is entitled to collateral estoppel where same facts underly plaintiff's new cause of action based on different legal theory).

That plaintiff's RICO claim is time-barred is obvious.[6] Plaintiff attempts to avoid the statute of limitations, as he did in the prior suit, by alleging fraudulent concealment. He asserts that it was only during the discovery process of the prior suit that he learned of the facts on which his RICO claims are premised. Complaint ¶16. Without specifying what these facts are, he broadly alleges that after commencing his action, he discovered that the government agencies involved in the divestiture were not "faithfully executing the laws of the United States." *Id.*

However, the Court of Appeals found that Berkson did not use due diligence in discovering the facts underlying his antitrust cause of action and, thus, that he did not meet the requirements to invoke the doctrine of fraudulent concealment. 743 F.2d at 56-57. Because the *facts* on which both claims are premised are identical, the finding of lack of due diligence precludes plaintiff from relitigating whether any of these new defendants fraudulently concealed his RICO claim.

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[6] This is so no matter what statute of limitations applies. *See infra.*

Plaintiff already has had his one bite at the apple to litigate the statute of limitations issues; he is not entitled to yet another. As the United States Supreme Court has made clear:

> Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U.S. 180, 185 (1952).

Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971). Moreover, collateral estoppel acts to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). This case readily invites — indeed, demands — application of these principles. All of plaintiff's claims based on the 1972 divestiture are time-barred as to these new defendants as well.

C. *Claims Based on Events in the Prior Federal Action*

In his complaint, plaintiff charges that some defendants acted improperly in the prior federal action. Specifically, plaintiff claims that Palmer & Dodge and Goodwin, Procter & Hoar (attorneys for Del Monte and United Brands respectively) misled the court about the facts, "blinded" the court, aided the court in "expunging" a document from court records, influenced the decision of Magistrate DeGiacomo and wrote the Magistrate's Decision for him.[7] Plaintiff additionally charges

[7]It is not insignificant, of course, that the judgment in the prior litigation was entered by the district judge — not the magistrate — and affirmed by the United States Court of Appeals.

[*footnote continued*]

Palmer & Dodge with refusing to correct, in open court, an incorrect answer to an interrogatory,[8] and with filing false affidavits. Similarly, plaintiff asserts that Del Monte filed false affidavits.

To the extent that these claims are alleged to violate RICO, they are barred by the applicable statute of limitations.

Because RICO contains no limitations period, this court must apply the most analogous state statute of limitations. *Wilson* v. *Garcia*, 471 U.S. 261 (1985). Under the test announced in *Garcia*, courts first must decide whether all causes of action under a particular federal statute should be characterized in the same way for limitations purposes, or whether individual determinations should be made based upon the underlying fact patterns in each case. *Id.* at 271-75. Courts that have addressed this issue in the context of RICO have reached opposite conclusions. *Compare Malley-Duff & Associates, Inc.* v. *Crown Life Insurance Co.*, 792 F.2d 341, 349, 352-53 (3d Cir. 1986) (court must choose *one* analogous state statute of limitations for all RICO claims; court chose state's catchall limitations statute for claims based on statute), *cert. granted*, 107 S.Ct. 569 (1987), with *Silverberg* v. *Thomson McKinnon Securities, Inc.*, 787 F.2d 1079, 1083 (6th Cir. 1986) (court must look to characterization of underlying facts in particular cases to determine analogous state statute of limitations; court chose limitations period for common law fraud).

Because Massachusetts does not have a limitations period specifically applicable to statutory causes of action, the most

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Plaintiff also asserts that Pillsbury, Madison & Sutro and Covington & Burling misled the court in the prior action. As there is no evidence that these two law firms were involved in the prior federal suit, it is difficult to see to what plaintiff is referring. To the extent plaintiff is complaining about actions that took place before the Louisiana federal district court in the early 1970s, his claim clearly is time-barred. *See* Part IIB, *supra*.

[8] In the answer, Del Monte gave the name of a bank incorrectly. The proper name was City National Bank; the answer to the interrogatory identified the bank as the First National Bank of Miami.

analogous statute of limitations under either prong of the test, is the three year limitations period contained in M.G.L. c. 260, § 2A.[9] Thus, plaintiff's cause of action is barred if it accrued prior to September 25, 1983.

The actions about which plaintiff complains specifically concern the issuance of Magistrate DeGiacomo's Report and Recommendation in July 1983. At the latest, plaintiff should have been aware of his cause of action by August 1983, when the district judge approved the magistrate's report, and entered judgment thereon, and plaintiff offers nothing to indicate that he was not, or was prevented from being, so aware.

Based on the foregoing, then, plaintiff's RICO claims based on defendants' alleged actions in the prior suit are likewise barred by the statute of limitations.

III. CONCLUSION

For the reasons set forth above, this Court accordingly recommends[10] that defendants' various motions for summary

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[9] M.G.L. c. 260, § 2A provides:

> § 2A. Three years; actions of tort, contract to recover for personal injuries and replevin
>
> Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

Although no court within the First Circuit has appeared to have decided this precise question, the court in *UST Capital Corp.* v. *Charter Nat'l Life Insurance Co.*, No. 77-21-Z, slip op. (D. Mass. 1986), agreed with the parties that § 2A governed in a RICO action based on fraud. Here, also, plaintiff's allegations concerning the defendants' actions in the prior suit most resemble claims that the defendants perpetrated a fraud upon the court.

[10] The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and

judgment be allowed, and that judgment accordingly enter for the defendants.

/s/

UNITED STATES MAGISTRATE

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the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See *United States* v. *Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States* v. *Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); see also, *Thomas* v. *Arn*, U.S. , 106 S.Ct. 466 (1985).